SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1968

No. 406

McCULLOUGH TOOL COMPANY,

Petitioner,

vs.

WELL SURVEYS, INC. (now by change of name DRESSER SIE, INC.), and DRESSER INDUSTRIES, INC.,

Respondents.

McCULLOUGH TOOL COMPANY,

Petitioner,

vs.

DRESSER INDUSTRIES, INC.,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

McCullough Tool Company, Petitioner herein, prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Tenth Circuit entered in the above-entitled cases on May 16, 1968.

OPINIONS BELOW.

This Petition seeks a review of the Judgment of the Court of Appeals for the Tenth Circuit (Appendix, p. 1), which affirms the Judgment of the United States District Court for the Northern District of Oklahoma (Appendix, p. 23).

JURISDICTION.

The Judgment petitioned from was entered May 16, 1968, and this Petition is being filed within the time limit.

Jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED.

1. Was the Trial Court's refusal to permit Petitioner to have a hearing to present evidence on its defenses in opposition to Respondents' Order to Show Cause in Civil Action No. 4271 and in support of Petitioner's action for Summary Judgment of non-infringement in Civil Action No. 6467, a denial of due process of law under the Fifth Amendment to the Constitution of the United States?

2. Where an unsuccessful and enjoined defendant in a patent infringement suit modifies the device found to infringe, in a manner which, in its counsel's opinion does not transgress the injunction, is such defendant, in a subsequent contempt proceeding or action for summary judgment of non-infringement, properly denied the right to introduce evidence and to be heard on the factual questions of whether:

a. In view of the prior art the modified device can legitimately fall within the scope of any of the patent claims and hence of any injunction authorized by 35 U.S.C. 283;

b. In view of the Patent Office prosecution history of the patent in suit the modified device can legitimately fall within the scope of any of the patent claims and hence of any injunction authorized by 35 U.S.C. 283;

c. The modified device is a mere aggregation and not a patentable combination and hence not within the legitimate scope of any of the patent claims or any injunction authorized by 35 U.S.C. 283;

d. The modified device is not the equivalent of the device found to infringe or any device described in the patent and hence not within the scope of the injunction.

3. Was the Trial Court's granting of a Motion for Summary Judgment contrary to the Federal Rules of Civil Procedure Rule 56, in view of the substantial issues of material facts, error which denied Petitioner its constitutional rights to present its defensive facts at a hearing?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

This Petition for Certiorari involves primarily Amendment 5 to the Constitution of the United States, which provides that "no person shall * * * be deprived of life, liberty, or property, without due process of law; * * *"

Also see *Windsor v. McVeigh*, 93 U.S. 274, 24 L. Ed. 914.

STATEMENT OF CASE.

In 1963, Petitioner McCullough Tool Company, subsequent to the Trial Court's decision of validity and infringement in Civil Action No. 4271, and following advice of counsel (R. 4146-4147)[1] modified its structure

[1]Record referred to is Record on Appeal to Court of Appeals for the Tenth Circuit.

to avoid infringement of the Swift patent, which structure is shown and described in the Stroud Affidavit (R. 4148).

On June 14, 1966 (R. 4608), Petitioner McCullough Tool Company filed an action for declaratory judgment, Civil Action No. 6467, asking the District Court to make a determination that the new McCullough structure does not infringe the Swift patent.

Following remand of Civil Action No. 4271, the Issuance of an Injunction was argued on June 15, 1966, and the Judge of the District Court for the Northern District of Oklahoma signed an Injunction (R. 4178).

On August 4, 1966, Respondents filed a Motion (R. 4182) asking the Trial Court to issue a citation for contempt against Petitioner by reason of its use of the new McCullough structure.

Petitioner opposed this Motion (R. 4235) and moved that it be dismissed. Petitioner requested that if its Motion be denied a hearing be set to give Petitioner the opportunity to present its evidence to the Court (R. 4235-4236).

On August 4, 1966, Respondents filed a Motion to Dismiss the Declaratory Judgment Action, Civil Action No. 6467 (R. 4622), which Motion was opposed by Petitioner (R. 4637).

On November 29, 1966, a Pre-Trial Hearing was had and this Pre-Trial Hearing was reported and appears at R. 4765-4947.

On this date Civil Actions Nos. 4271 and 6467 were consolidated for Pre-Trial and Trial (R. 4836) and Petitioner was ordered to show cause why it should not

be held in contempt (R. 4946). The Trial thereon was set for January 9, 1967 (R. 4902). At the Pre-Trial Hearing of November 29, 1966 (R. 4765-4947) it was agreed and ordered by the Trial Court that Petitioner could present evidence of non-infringement, evidence to determine the scope of the Swift claims, and evidence of misuse of Swift and Fearon after March 16, 1961, including depositions to be taken (R. 4777, 4813, 4818, 4836, 4897, 4898, 4899, 4904 and 4907).

On December 21, 1966, Respondents filed a Motion for Summary Order (R. 4675) to hold Petitioner in contempt of Court for violation of the Injunction entered June 15, 1966, and for an order precluding McCullough Tool Company from introducing any evidence in defense of its position.

On December 28, 1966, Petitioner filed its Response of McCullough Tool Company to Order to Show Cause why it Should not be Held in Contempt (R. 4589-4591). In this paper Petitioner presented five grounds on which it intended to present evidence at the hearing which had been scheduled for January 9, 1967.

When it appeared that neither party could meet the Pre-Trial schedule set on November 29, 1966, or be ready for Trial on January 12, 1967, Petitioner made a Motion (R. 4682) to strike these causes from the trial calendar and reset such trial at a date subsequent to March 1, 1967. The Motion was based on the ground that the causes were not ready for trial, could not be ready for trial at the date assigned, that witnesses necessary to the trial could not attend, and new discovery commenced at a then recent date could not be completed and executed within the time remaining for the purpose (R. 4682).

The Court ordered the cause striken from the trial calendar (R. 4701), stating: "It appearing that pending discovery and trial preparations cannot reasonably be completed within the times allowed for the same, and that a further pre-trial conference is desirable therein * * *", and the Court thereupon ordered the Motion granted.

A further Pre-Trial was ordered and had on January 12, 1967, which appears at R. 4948-4992.

On this date, January 12, 1967, Petitioner was not permitted to present any evidence. The Court announced that it was going to rule on the matters before it without trial.

The issues of fact which were raised in Petitioner's response to Order to Show Cause (R. 4589), in Petitioner's Complaint for declaratory relief in Civil Action 6467 (R. 4608-4612), in Respondents' answer and counterclaim (R. 4640-4648), in Petitioner's reply to counterclaim (R. 4649-4653), and factual issues, which were set up for trial during the Pre-Trial Hearing on November 29, 1966, and which are: (a) Whether or not the claims of the Swift patent can be construed broad enough to cover the new McCullough structure; (b) The content and effect of the prior art on determining whether or not the claims are of sufficient scope to be infringed by the new McCullough structure; (c) The difference in mode of operation of the device of the patent in suit and the new McCullough structure; (d) Non-equivalency of elements and combinations of parts in McCullough's new structure, as compared to the structure of the patent in suit; and (e) Misuse of the Swift patent after the decision of March 16, 1961.

Evidence of the content and scope of the prior art and the differences between the claims in issue and the patented structure and the prior art are questions of fact. See *Graham, et al. v. John Deere Co. of Kansas City, et al.*, 383 U.S. 1, 15, 16, 15 L. Ed. 2d 545.

Where facts as to infringement are in dispute, infrigement is a *question of fact.* Whether Petitioner's new structure is a different thing from the patented structure is a question of fact. See *Moist Cold Refrigerator Co. v. Lou Johnson Co.* (C.A. 9, 1957), 249 F. 2d 249.

The question of equivalency is a question of fact. See *Graver Mfg. Co. v. Linde Co.*, 339 U.S. 605, 609, 610.

The Trial Court's summary disposition of the matters previously set for trial deprived Petitioner of the right to introduce evidence to establish the five points contained in its Response to Order to Show Cause Why it Should not be Held in Contempt of Court; and more particularly, Petitioner was prevented from introducing evidence as to the prior art, evidence of the effect of the prior art on the interpretation of the claims as to whether or not the new McCullough structure infringed the Swift patent, and was prevented from presenting evidence of misuse of the Swift and Fearon patents since the decision of March 16, 1961.

No affidavits were submitted by Petitioner either in connection with Respondents' Motion for Order holding McCullough in Contempt of Court or in the declaratory judgment action with respect to the facts of the prior art, its effect on the scope of the Swift claims, nor on any of the factual issues.

However, even though affidavits had been filed, they can be considered in summary judgment matters only for the purpose of determining whether an issue of fact is presented but not as the basis of deciding the issue of fact. See *Frederick Hart & Co. v. Recordgraph Corporation* (C.A. 3, 1948) 169 F. 2d 580.

The Court granted Respondents' Motion for Summary Judgment in Contempt of Court by infringement of the Swift patent, notwithstanding the genuine issues of material facts. The Trial Court stated:

> "The Court finds that there is no genuine issue of material fact and that plaintiff is entitled to a judgment as a matter of law.
>
> "So, in the disposition of this matter by the motions, the Court will, in Civil Action No. 4271, Well Surveys versus McCullough; the motion for order citing McCullough for contempt is sustained. The motion for summary judgment is sustained. * * *" (R. 4953, line 25, R. 4954, lines 1-7).

Furthermore, the Court made no ruling whatsoever on the defense of misuse to the citation for contempt and as a defense of unenforceability of the patent in the declaratory judgment action.

Record 4950-4954 shows that the Court made no reference to any defense relied on by Petitioner, except non-infringement as viewed by the Court, without reference to the prior art, the scope of the claims as interpreted by the prior art, the different mode of operation, mechanical equivalency or misuse.

Respondents had theretofore presented authorities that summary judgment was proper in contempt proceedings (R. 4560); but even so, a Court cannot grant

summary judgment where there is even a single genuine issue of material fact.

See Federal Rules of Civil Procedure, Rule 56; *Hazeltine Research, Inc. v. General Electric Co.* (C.A. 7, 1950), 183 F. 2d 3; and *Cee-Bee Chemical Co., Inc. v. Delco-Chemicals, Inc.* (C.A. 9, 1958), 263 F. 2d 150.

REASONS WHY WRIT SHOULD BE GRANTED.

Question I.

The refusal of the Trial Court to give Petitioner the right to be heard and the Judgment of the Trial Court ordering that no further evidence be introduced on behalf of Petitioner (R. 4702) deprived Petitioner of its due process of law which requires that a party not only have notice of a hearing, but that he be afforded the opportunity to be heard. See the decision of the Tenth Circuit of *Roberts v. Anderson,* 66 F. 2d 874 at 876, and also *Windsor v. McVeigh,* 93 U.S. 274, 24 L. Ed. 914, cited with approval therein.

The Fifth Amendment of the Constitution of the United States provides that "no person shall * * * be deprived of life, liberty, or property without due process of law".

On the point of Civil Remedies under Due Process of Law, 12 Corpus Juris, Paragraph 997, page 1220 (Constitutional Law), states:

> "* * * These guaranties do require, however, that the substance of property rights be preserved, and that some adequate and appropriate remedy be afforded for their vindication. They require also that such remedy shall be by a regular and orderly mode of procedure in a court of competent jurisdiction, and that defendant shall have notice, and an opportunity to be heard in his defense. * * *"

This same Volume under Constitutional Law, Paragraph 1009, page 1234 states:

> "* * * Every man is entitled to his day in court before his rights can be finally disposed of, and he cannot be divested of this right by any act of the legislature. Due process of law requires an orderly proceeding adapted to the nature of the case, in which proceeding the citizen has a right and an opportunity to be heard and to defend, protect, and enforce his rights, by establishing any fact which, under the law, would be a protection to him or to his property. * * *"

Question II.

Following successful infringement litigation an enjoined defendant frequently adopts a modified device not adjudicated in the original proceedings. The question thus posed is whether the modified device is or legitimately can be within the scope of the original injunction.

Regardless of the procedural mechanism employed to raise the issue, i.e., contempt proceedings or a new infringement suit, the courts, until the present case, have been zealous to insure the enjoined defendant a full right to be heard where any possible question was presented as to infringement by the modified device. Necessarily so, since to hold otherwise would *a fortiori* result in a judicial extension of the patent to deter the marketing of devices outside the legitimate scope of the patent monopoly.

> "Further, if notwithstanding there is a real issue, it should be determined to try the matter out in the contempt proceeding, full opportunity

> ought to be given both the plaintiff and defendant to determine whether or not the device complained of in the contempt proceeding is in fact and law the equivalent of the adjudicated structure."
>
> *Patton v. Stone* (C.A. 5, 1949), 178 F. 2d 515, 518.

And, "'* * * If testimony and cross-examination are required to justify the issuing of supplementary injunction, there is small practical difference between [a contempt proceeding] and the institution of a new suit.'" *Hartford-Empire Co. v. Obear-Nester Glass Co.* (C.A. 8, 1938), 95 F. 2d 414, 423.

But, irrespective of which course is followed, the party charged with violating an injunction, or with infringement is entitled to present evidence on his own behalf.

In conflict with these principles, and with the fundamentals of substantive due process, including the right to be heard, which they guarantee, the Court below has affirmatively *denied* Petitioner the right to introduce evidence or to be heard on the determinative question of whether its modified device is or can be a violation of either the Swift patent, or of the injunction issuing out of the original infringement litigation. In flagrant disregard of the most elemental concepts of justice and fair play the Court below has endorsed the Trial Judge's conclusionary "finding" *in the absence of evidence* other than a drawing of the device itself and an affidavit showing the modification "* * * that the 'McCullough device is only a colorable variation of the Swift patent,' that the modified device 'does the same work in substantially the same way to accomplish sub-

stantially the same result as the Swift device' and that the 'modified apparatus comes within the scope of the claims in the Swift Patent.' * * *" (Appendix; pp. 5-6).

The Court below thus espoused the *refusal* of the Trial Court to permit Petitioner to introduce evidence to show the contrary—*including evidence to show that the modified device could not* fall within the valid scope of the Swift claims, and, hence, could not fall within any injunction authorized by 35 U.S.C. 283.

The importance of the questions presented by this Petition is thus apparent. Unless the Decision below is promptly disapproved, it will stand as dangerous precedent further confusing the law in the lower Tribunals as regards the procedures to be followed and the rights of defendants and the public after successful infringement litigation.

This fundamental issue appears in its major role when viewed in the context of the specific sub-questions inherent in it.

A. The "Prior Art" Issue.

The Court below completely ignored the fact that no injunction under 35 U.S.C. 283 can preclude the practice of the prior art (35 U.S.C. 102), or of that which is obvious in view of the prior art (35 U.S.C. 103), or of subject matter which is not otherwise within the legitimate scope of the patent monopoly.

The Court, in conflict with more recent and correctly reasoned precedent, found McCullough's claims that it should be allowed to introduce evidence upon the issues "(a) whether or not the claims of the Swift Patent

can be construed broad enough to cover the new McCullough structure;" and "(b) the content and effect of the prior art on determining whether or not the claims are of sufficient scope to be infringed by the new McCullough structure", to be "conclusively" answered by the alleged fact that "The validity of the Swift Patent and the scope of its claims, were conclusively determined as between the two parties in the instant suit in the original infringement suit. See Krentler-Arnold Hinge Last Co. v. Leman, 1 Cir., 90 F.2d 699. And Wadsworth Electric Mfg Co. v. Westinghouse Electric & Mfg. Co., supra. * * *"[2].

In *direct conflict* with the ruling below, and the precedent to the extent opposite on which it relies, the Court of Appeals for the Fourth Circuit, on April 11, 1968, in *Ransburg Electro-Coating Corp. v. Ionic Corp.*, ..., F. 2d ....., 157 U.S.P.Q. 662 held:

> "The defendant has appealed from an order holding it in contempt of an injunctive order entered in a patent case. The contempt finding is premised upon a finding that certain devices for use in electrostatic spray painting systems are the equivalent of certain other devices previously found to infringe the plaintiff's patents and that the sale and use of the new devices were proscribed by the terms of the injunction. In light of the prior art, which the patentee has no right to appropriate, we think the finding erroneous." (p. 663).

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[2]To which may be added *John W. Gottschalk Mfg. Co. v. Springfield Wire & T. Co.* (C.A. 1, 1937), 90 F. 2d 468; *Patton v. Stone* (C.A., 5, 1949), 178 F. 2d 515, 517; and *United States Rubber Co. v. General Tire & Rubber Co.* (C.A. 6, 1942), 128 F. 2d 104.

"[1] Regardless of the answers to all of these questions arising out of an interpretation of the language of the injunction, consideration must be given to the prior art for it was never intended, of course, that the injunction should prohibit its practice." (p. 666).

"It is clear that the only active discharging electrode is the separate electrode connected to one side of the power source. It is the sole source of the negative ions effectively charging the particles of paint and moving them toward the work. While the head is the recipient of such ions by bombardment from the electrode just as the particles of paint are, it supplies none of itself." (p. 666).

"[2] It follows that Ransburg did not sustain the heavy burden placed upon it of showing that Ionic was in contempt of the court and in violation of its decree by producing and marketing the presently accused devices." (p. 666).

It seems quite clear that the Fourth Circuit is correct and that the Tenth Circuit is incorrect on this important issue.

This Court, without deviation, has emphasized that *whatever* the legal device employed, the monopoly of a patent is not to be extended to unpatented or unpatentable subject matter. See, in the field of licensee and assignee estoppel, the following cases:

E-I-M Company v. Philadelphia Gear Works (C.A. 5, 1955), 223 F. 2d 36;

Westinghouse Electric & Mfg. Co. v. Formica Insulation Co., 266 U.S. 342, 350-351, 45 S. Ct. 117, 69 L. Ed. 316;

Casco Products Corp. v. Sinko Tool & Mfg. Co. (C.A. 7), 116 F. 2d 119, 121;

Automatic Paper Machinery Co. v. Marcalus Mfg. Co. (C.A. 3), 147 F. 2d 608, 611, 613, affirmed *Scott Paper Co. v Marcalus Mfg. Co.*, 326 U.S. 249, 66 S. Ct. 101, 90 L. Ed. 47;

General Mfg. Corp. v. Gray (D.C. Okla.), 48 F. 2d 602;

Union Carbide & Carbon Corp. v. Graver Tank & Mfg. Co. (C.A. 7) 196 F. 2d 103.

Similarly, as to expired patents, see *Brulotte v. Thys Co.*, 379 U.S. 29, 13 L. Ed. 2d 99, 85 S. Ct. 176, and as to "Tying", see *Mercoid Corporation v. Mid-Continent Co.*, 320 U.S. 661.

Surely this universal principle applies with particular force to judicially created expansions by the mechanism of inappropriate injunctions.

In the context the need for review of the decision below is further emphasized by the opinion in *E-I-M, supra*. In that case, while limited evidence of the prior art was, in fact, received by the trial court, the Court of Appeals for the Fifth Circuit stated that the licensee and assignee estoppel cases cited *supra*, may be distinguished generally on the ground that they involved elements of estoppel against a party to dispute the validity of a particular patent arising from an assignment or licensee and in none of them had there already been a binding judicial determination, as here, of the validity of the particular patent involved.

This purported distinction, of course, overlooks not only the underlying premise of the estoppel cases, but also the fact that under 35 U.S.C. 283 "it was never

intended that the injunction should prohibit" the practice of the prior art. *Ransburg, supra.*

In *Union Carbide v. Graver Tank,* 282 F. 2d 653; 660, the Seventh Circuit stated:

> "'One may legitimately study the patent and miscroscopically examine the language of the claim in order to make a product which will serve the same purpose and yet avoid infringement of the patent. Such a right is the logical beneficial result which was sought through the adoption of the comprehensive patent system of our government.'
>
> "The boundaries of the monopoly which Union Carbide acquired by its patent were defined and limited by its claims. All outside that boundary was in the public domain. We think it does not detract from the good faith of a competitor for him to procure and examine a patent and its claims, as well as the subject matter thereof, in order to ascertain what is open to the public. Moreover, no inference of bad faith can be drawn from the fact that Lincoln procured an opinion from a competent patent counsel. If anything, it shows that Lincoln was making a good faith effort to avoid infringement. * * *"

Even in cases where a licensee is estopped from asserting invalidity, the licensee may, nevertheless, show non-infringement by referring to the prior art. In *Casco Products Corporation v. Sinko Tool & Mfg. Co.* (C.A. 7, 1940), 116 F. 2d 119, the Court at page 121, stated:

> "* * * defendant is not estopped to prove that its devices are built wholly according to the teaching of the prior art and that everything necessary to

their conception and construction was taught by such art, for such proof clearly negatives infringement. In other words if everything in defendant's construction was taught by the prior art and nothing included therein other than the application of such art, plus ordinary mechanical skill, *then the mere fact that the device constructed reads upon the claims of patents, the validity of which is estopped to deny, does not spell infringement.* Our conception of our obligation, therefore, is that we must examine the prior art not only to determine the scope of plaintiff's invention but also to determine whether what is built by defendant springs entirely therefrom. The defendant's position is that its devices intentionally follow its earlier patents and that those patents taught defendant everything necessary to the conception and construction of its devices." (emphasis added).

If this conflict is resolved, as it should be, and as the decisions of this Court demand, then the finding of contempt must be reversed.

Certiorari should be granted to resolve the conflict in the Circuits on the file wrapper estoppel issue.

B. The "Equivalents" Issue.

Many Courts have held that in proceedings for contempt for violation of an injunction against infringement:

"* * * the question is only whether the modified structure is equivalent to the original in relation to the patent in suit. * * *"

Wadsworth Elec. Mfg. Co. v. Westinghouse E. & Mfg. Co. (C.A. 6, 1934), 71 F. 2d 850, 851

See also *Patton v. Stone,* supra, and *E-I-M Company v. Philadelphia Gear Works,* supra.

The question of equivalency is a question of fact. See *Graver Mfg. Co. v. Linde Co.,* 339 U.S. 605, 609, 610:

> "A finding of equivalence is a determination of fact. Proof can be made in any form: through testimony of experts or others versed in the technology; by documents, including tests and treatises; and, of course, by the disclosures of the prior art. Like any other issue of fact, final determination requires a balancing of credibility, persuasiveness and weight of evidence. It is to be decided by the trial court and the court's decision, under general principles of appellate review, should not be disturbed unless clearly erroneous. * * *"

On this record the conclusion of the two lower courts that there was no genuine issue of material fact and, therefore, that W.S.I. was entitled to judgment as a matter of law cannot stand. Petitioner was foreclosed from introducing evidence to eliminate the factual question of equivalents which was and is a substantial issue for determination by the Court. The decision below is thus in direct derogation of Rule 56 and in direct conflict with precedent guaranteeing petitioner a "full opportunity * * * to determine whether or not the device complained of in the contempt proceeding is in fact and in law the equivalent of the adjudicated structure". *Patton v. Stone, supra,* and cases cited.

Question III.

Petitioner's Complaint for Declaratory Judgment in Civil Action 6467 was answered by Respondents filing an Answer and Counterclaim (R. 4640-4648) on December 9, 1966; and Petitioner replied to Counterclaim (R. 4649-4653) on December 19, 1966.

The Complaint asks for declaratory judgment that the new McCullough structure does not infringe the Swift patent. In answer to Respondents' Counterclaim Petitioner's reply pleads prior art (R. 4651) and in Paragraph E (R. 4652) alleges the prior art patents and prior uses limit and narrow the construction of the claims of the Swift patent so that they are not entitled to a range of equivalents broad enough to cover the new McCullough structure as shown in Exhibit A (R. 4612) attached to the Complaint.

Paragraph G (R. 4652) pleads file wrapper estoppel and Paragraph H (R. 4652) pleads unenforceability of the Swift patent because of its misuse against public policy and in violation of the anti-trust laws.

At the summary hearing on January 12, 1967, the Trial Court, after disposing of Respondents' Motion for citing Petitioner in contempt, dismissed Civil Action No. 6467 (R. 4954).

The Judgment (R. 4704) erroneously orders, adjudges and decrees that, there remaining no genuine issue of material fact to be tried in Case No. 6467, summary judgment be rendered for Respondents as a matter of law.

Because of the issues set forth in the Complaint, Answer and Counterclaim, and Reply to the Counterclaim, the Trial Court erred in concluding that there

were no genuine issues of material facts to be tried in Civil Action No. 6467.

Because there are many genuine issues of material facts to be tried, and particularly those set out in the Reply to Counterclaim, the Judgment of the Trial Court should be reversed and remanded with an order to set the declaratory action for trial.

Petitioner, by the Trial Court's dismissal without trial, was deprived of its right to introduce factual evidence and expert evidence to establish non-infringement.

Petitioner was deprived of its right to a full trial in the action for declaratory judgment, which was properly filed, followed by an Answer and Counterclaim, and Reply to Counterclaim, after which the trial date was set, but which was erroneously decided on a summary proceeding.

Petitioner was deprived of its due process of law under the Fifth Amendment as pointed out in detail and under the authorities set forth in a prior section.

Respectfully submitted,

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Of Counsel:
EDWARD S. IRONS

Dated August 13, 1968.